Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1363

UNITED STATES OF AMERICA

v.

DOMINIC ALESSIO, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered June 21, 1976, and (2) granting the petition.

After the filing of this Petition for Writ of Certiorari, the Third Circuit, in *U.S.* v. *Morrison*, C.A.3d, April 27, 1976, recognized that under some circumstances, if the Prosecution refuses to apply for use immunity on behalf of a defense witness, the trial court must enter a judgment of acquittal. See *Earl* v. *U.S.*, 361 F.2d 531 (D.C. Cir. 1966). In the case at bench, the trial court felt it lacked authority to deal with the

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Prosecution's refusal. On appeal, the Ninth Circuit stated that the right of Petitioner to obtain witnesses "... must be exercised consistent with the government's power to determine which cases will be prosecuted."

Petitioner was convicted of giving an illegal gratuity to an official of the Lompoc Minimum Security facility. Petitioner testified that he acted not on personal motive, but in compliance with a request from Maurice Friedman. Petitioner sought use immunity for Friedman to bring that exculpatory evidence before the jury. The Prosecution refused.

Has the Court's calendar become so crowded that it is incapable of considering violations of the Constitution and a resulting improper conviction? We are not here concerned with a mere difference of opinion between a defendant and a district court; the Circuits are in conflict in approaching use immunity questions. Without addressing itself to use immunity, the Ninth Circuit allowed the Prosecution to control the use immunity process in contravention of the right to obtain witnesses secured by the Sixth Amendment and right to due process secured by the Fifth Amendment.

We have yet to receive a judicial response that suggests the consideration due Petitioner's contention set out in the following few paragraphs. Nor has the Government been required to file a brief, explaining its prosecutorial interests in use immunity.

Had the District of Columbia Circuit or Third Circuit been confronted with the facts of the case at bench, the judgment would not have been affirmed be-

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low since the following facts would have controlled:

(a) The prosecutor immunized a prosecution witness (Petition for Writ at page 10), but refused the defendant's request to immunize defense witnesses.

(b) The prosecutor convinced potential defense witness Goddard to assert the Fifth Amendment by referring to him as "this defendant," repeating warnings about a pending indictment and self-incrimination, and advising him that questions would be asked regarding his culpability; all this after Goddard had presented himself to the court, after the Court's warnings, "to be of help to anybody, you know, who's here." (Reporter's Transcript at 1070, 1074, 1083.)

(c) By refusing to allow the trial court to consider immunizing Friedman, the prosecution kept out Friedman's testimony that he had requested petitioner to supply the official with complimentary accommodations, and that it was the custom in the restaurant-hotel industry to make and summarily honor such requests.

(d) Friedman was the subject of an extensive investigation and the Government had determined not to prosecute him.

(e) The prosecution argued to the jury that there was no evidence that Friedman was, in any manner, involved.

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CONCLUSION

In contending that the Prosecution violated his constitutional rights by intimidating a defense witness into asserting the Fifth Amendment, using the immunity power only to obtain a witness for the Prosecution, and by commenting upon the absence of exculpatory evidence when the Prosecution had blocked its entry, Petitioner has asked:

1. What does the Prosecution lose when a witness is granted use immunity?

2. When and how may the Prosecution permissibly profit by barring exculpatory evidence?

These are only two of the use immunity questions presented. Because the Ninth Circuit either failed to answer, or provided answers which are in conflict with other Circuits, the denial of certiorari should be reconsidered to the end that Petitioner's conviction be evaluated on the basis of definitive standards for the utilization of the use immunity power by the Government.

Respectfully submitted,

HASKINS, LEWIS, NUGENT &
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By _____
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CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2).

Executed this 8th day of July, 1976, at San Diego, California.

THOMAS P. NUGENT

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